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Supreme Court of the United States

OCTOBER TERM, 1953.

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No. 284

SEACOAST GAS COMPANY, INC. and ST. PAUL-MERCURY INDEMNITY COMPANY, as Surety,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT).

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(AND BRIEF IN SUPPORT)

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on May 29, 1953, rehearing denied July 20, 1953.

Opinion Below.

The opinion in the Court of Appeals will be found on page 161 of the transcript of the record and is also reported in 204 F. 2d at page 709. The opinion reverses the judgment of the District Court for the Southern District of Georgia in connection with which an opinion was rendered. The opinion of the District Court will be found beginning at page 37 of the transcript of record.

Jurisdiction.

The judgment of the Court of Appeals having been entered May 29, 1953 (R. 163) and that Court having denied a motion for rehearing on July 20, 1953 (R. 175) the jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254 (1).

Questions Presented.

1. Can a contractor who had unadvisedly refused to perform his contract, while the situation of things is unchanged, retract the refusal and go on with the contract?

2. If the promisee refuses to accept the renunciation and instead demands performance may the promisor retract the renunciation prior to any change of position on the part of the promisee?

3. Where one party to a contract makes a mere declaration of an intention not to perform it, and the other party calls upon it to withdraw such declaration and perform and with such demand states "unless we receive from you a written withdrawal of your cancellation notice and assurance of continued performance under your contract * * * within three days from the date of this notice, we shall proceed to accept the bid of Trion Gas Service, Incorporated, the low bidder, and hold you and your performance bond obligated for your breach of performance of your contract", and thereafter more than three days after the date of such letter but prior to the time the promisee became bound in any manner to Trion in connection with the contract, the promisor withdrew such notice of cancellation and gave assurance of continued performance, does such retraction come in time?

Statement.

Brought against Seacoast Gas Company and the surety on its performance bond, the suit was for damages alleged to have resulted from the anticipatory breach by the gas company of its contract with plaintiff to supply gas to a Federal Housing Project during the period from April 15, 1947 to June 15, 1948.

The Government claimed that on October 17, 1947, while performance of the contract was in progress Seacoast anticipatorially breached the contract by writing plaintiff unequivocally that, because of plaintiff's breach of the contract, Seacoast intended to cancel same as of November 15, 1947. Plaintiff promptly notified Seacoast that it did not recognize any right in it to cease performance and that it purposed to advertise for bids to insure a continued supply of gas if Seacoast's breach persisted.

Thereafter, plaintiff having advertised for bids and having received a low bid from Trion Company, on November 6th wrote a letter to Seacoast that unless it retracted its repudiation of the contract within three days from the date of the letter, that plaintiff would proceed to accept the bid of Trion and hold Seacoast and its surety obligated for its breach of performance of the contract.

On November 13th, Seacoast, in writing, withdrew its cancellation notice and assured plaintiff that it would continue performance under the contract. Notwithstanding the receipt of this letter, plaintiff proceeded on November 17th to enter into a contract with Trion Gas Service and thereafter prevented Seacoast from fulfilling its contract.

The District Court held that the *locus poenitentiae* extended until November 17th when the contract was signed, and when plaintiff first became bound to Trion.

The Court of Appeals held that the *locus poenitentiae* ended three days after the date of plaintiff's letter of November 6th without regard to whether there had been any change in the plaintiff's position or not.

Plaintiff's letter of November 6th and defendant's letter of November 13th are attached as an appendix hereto since they do not appear in the transcript of the evidence. The originals were transmitted to the Court of Appeals and upon the filing of this petition, a motion will be filed in the Court of Appeals asking that it transmit these original letters to this Court for use in considering this application.

Specification of Errors Urged.

The Court of Appeals erred:

1. In failing to hold that the effect of repudiation is nullified where statements constituting such repudiation are withdrawn before the adverse party has materially changed his position in reliance on the repudiation.

2. By holding that the *locus poenitentiae* ended three days after the date of plaintiff's letter of November 6th to Seacoast calling on it to withdraw its repudiation and give assurance of performance of the contract even though plaintiff between November 6th (the date of the letter) and November 13th (the date of defendant's withdrawal of the renunciation) did not take any action that materially changed its position, but merely negotiated with a prospective supplier.

3. The Court of Appeals should have held that after the expiration of the three day period established in its letter of November 6th, that it was still necessary for plain-

tiff to make some material change of position in reliance on the repudiation, and no such change having taken place, defendant's withdrawal of its renunciation on November 13th came in time.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in conflict with the decisions of another Court of Appeals.

2. The Court of Appeals has laid down a rule of interpretation in connection with the law of contracts that is in conflict with the rules as long established by text writers and such decision has thereby departed from an accepted and usual rule for construction of contracts applied by this Court and by a majority of the courts of the Country.

3. If the writ should be refused and the decision of the Court of Appeals allowed to stand, it would cause great confusion and leave the established law for the construction of contracts applicable and of force in all of the Circuits except the Fifth Circuit and would cause great confusion and injustice to the residents and citizens of the States embraced within the Fifth Circuit.

The Rule of Construction That Should Have Been Applied.

The proper rule of construction under the great weight of authority, and a rule almost without exception, is that a contractor who has unadvisedly refused to perform his contract while the situation of things is unchanged can retract that refusal and go on with the contract.

> "Where a renunciation of a contract is treated by the adverse party as a breach, the party cannot accord-

ing to some authorities, withdraw his renunciation and offer to perform, although the time for actual performance has not arrived. To the contrary, however, it has been held that a contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal and go on with the contract, and is not cut off from so doing by the service on him of a notice to the effect that the contractor will hold such refusal to be a default, and will sue to dissolve the contract.

"In case the renunciation of the contract is not accepted by the adverse party, the renunciation may be withdrawn and the party renouncing after performance on his part may hold the adverse party to performance."

17 C. J. S. Sec. 473, page 979.

"The *locus poenitentiae* is kept open until the injured party elects to treat the contract as abandoned by the other party and brings action for non performance. A mere declaration by one of the parties to an executory contract of an intention not to perform it, which it retracted almost immediately and before any declaration had been made or act done by the other party in respect to such renunciation and before injury therefrom has resulted to him or a change in his situation or the condition of the subject matter has occurred, does not constitute a breach, unless perhaps in the case of a contract of marriage or other similar contracts imposing peculiar obligations upon the parties during the time intervening between the making and performance thereof. A withdrawal of a repudiation obligates the other party to perform."

12 American Jurisprudence Sec. 398.

"The effect of repudiation is nullified (a) where statements constituting such a repudiation are withdrawn by information to that effect given by the repu-

diator to the injured party before he has brought an action on the breach or has otherwise materially changed his position in reliance on them."

Restatement of Contracts Sec. 319.

The comment on this section in Restatement contains the following:

"If the repudiation is an anticipatory breach and is effectively withdrawn there is no breach, since the rule operates retroactively."

"Thus, while it appears to be the rule that an unqualified notice to the seller by the purchaser that he will refuse to accept the goods under the terms of the sale agreement will, if not withdrawn, dispense with any subsequent tender by the seller on the date set for performance, yet where, as here, the seller did not elect to act upon such anticipatory breach by bringing suit for such damages as may have accrued, and where there is proof indicating that before the date set for final performance the buyer withdrew his renunciation and announced his readiness to accept the goods, it became incumbent upon the seller to comply with his own obligations under the contract, by tendering the goods in accordance with the contract * * *".

Southern Saw Mill Co. vs. *Herzfield,* 35 Ga. App. 206.

"The theory of the trial court was that when respondents stated they would not deliver the steers to appellant, he then had the option of treating the contract as anticipatorily breached, or refuse to accept the repudiation by respondents, and treat the contract as still in effect. Appellant pursued the latter course. He repeatedly urged respondents to deliver as agreed. On Monday morning, after being informed by respondents that he could not have the cattle, appellant went

to the feed yard for the purpose of getting them, and undoubtedly would have taken them had he not found the gates locked. Because of these demands by appellant, and apparently after discussing the matter further among themselves, respondents retracted their repudiation and tendered delivery to appellant on Tuesday, February 2nd.

"We agree with the trial court that, under the facts of this case, and the law applicable thereto, appellant's refusal to take delivery on Tuesday, when he was told to take the cattle, constituted a breach of the contract on his part, and that he should take nothing by this action.

"It is undoubtedly true that respondents' refusal might have been treated by appellant as an anticipatory breach of contract. Restatement of the Law of Contracts, Sec. 318, defines anticipatory breach as follows:

> 'Any of the following acts done without justification by a promisor in a contract * * * constitutes an anticipatory repudiation which is a total breach of contract: (a) A positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties'.

"Respondents later retracted their refusal, and offered to perform in accordance with the terms of their contract. Section 319, i d., states:

> 'The effect of repudiation is nullified (a) where statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he has brought an action on the breach or has otherwise materially changed his position in reliance on them'.

"We are of the opinion that when the parties met at the feed lot, the agreed place of delivery, on Tuesday, February 2nd, the contract was in full force and

effect, respondents being bound to tender delivery, and appellant being bound to accept.'"[1]

Walker vs. *Herke*, 20 Wash. 2d 293, 147 P. 2d 255.

"But going back to the question of whether an anticipatory renunciation is to be treated, by and of itself, as a breach of contract, or whether it is to be treated as giving the aggrieved party to the contract the option of regarding it as rescinded or as regarding it as continuing for the purposes of his recovery, we are bound to say that we think most of the dispute is over what the thing is to be called rather than over what the thing actually is. The major proposition of those who would regard it as a breach is the fact that on the theory that the renunciation must be acted upon by the innocent party, we have the anomaly of a breach of contract which consists, in part, of the conduct of the aggrieved party thereto. Those who would maintain the doctrine that an anticipatory renunciation may be treated by the aggrieved party as altogether terminating the contract reach their conclusion by saying that the anticipatory renunciation, in effect, constitutes an offer to rescind which, when accepted by the injured party from that time wipes out the contract leaving with the aggrieved party the right to recover what he has paid under it. *Those who would maintain this view point to the fact that under all authority an anticipatory renunciation may be withdrawn,* and hence that it cannot be regarded as a true breach of contract. The restatement of the Law apparently takes the middle ground between these two viewpoints and asserts that while anticipatory repudiation of a bilateral executory contract constitutes by and of itself a breach of that contract, it is not such a breach as cannot be withdrawn by the offending party and is not such a breach as that the running of the statute of limitations begins from its date. See Restatement,

[1] This decision also quotes with approval section 392, 393, 305 and 398 of 12 Am. Jur.

Contract, Secs. 318, 319, 322. But see Williston on Contracts, Sec. 1337, vol. 3, p. 2391; 5 Page on Contracts, Sec. 2893, p. 5113; 13 C. J. p. 151, Sec. 725 *et seq.*; 1 R. C. L. p. 1024, Sec. 385,[2] where anticipatory renunciation is treated as constituting a breach only at the option of the aggrieved party." (Emphasis ours.)

Harless vs. *Western Southern Life Ins. Co.*, 192 S. E. 137, 139.

"The repudiator has the power of retraction prior to any change of position by the other party, but not afterwards."

Anson on Contracts—Sixth Edition, Sec. 385, page 444.

Conflict Between the Fifth and Tenth Circuits.

In the case of *Bu-Vi-Bar Petroleum Corporation* vs. *Crowe*, 40 Fed. 2nd 488, the Court of Appeals for the Tenth Circuit held that where the defendant notified the plaintiff that it did not intend to perform its contract and plaintiff, upon receipt of the notice, requested performance, that this request "kept the contract open for both parties" until the position of the injured party changed.

The Tenth Circuit held in this case that the right to the repudiator to withdraw his renunciation continued after the injured party's demand for performance until the injured party, relying upon the renunciation thereafter let leases upon land the subject matter of the contract lapse. This, of course, was a change in position sufficient to evidence acceptance of the renunciation.

The case at bar would have been on "all fours" with Bu-Vi-Bar, *supra*, if Seacoast had waited to withdraw its

[2] Apparently this should be 6 R. C. L. page 1024, Sec. 385.

renunciation *after* plaintiff had let a contract to Trion to furnish the gas. But this was not what happened. In our case the decision of the Court of Appeals for the Fifth Circuit would probably be right if plaintiff in its letter of November 6th had stated that after the three day period the renunciation would automatically stand accepted but the letter did not so state. Instead plaintiff's letter outlined the course of action it expected to take, i. e., that unless it received "a written withdrawal of your cancellation notice and assurance of continued performance under your contract" within three days "we shall proceed to accept the bid" of Trion and hold defendant and the surety on its bond for breach of performance of its contract. We respectfully submit that Bu-Vi-Bar, *supra,* is authority for the holding by the District Judge that the *locus poenitentiae* did not end on November 9th but extended until November 17th when the bid of Trion was accepted and a contract entered into by plaintiff with that company.

Accordingly the decision of the Fifth Circuit holding that "the *locus poenitentiae* ended with these three days" (the three days next after the letter of November 6th) without the plaintiff actually doing the thing it said it would do (accept the Trion bid and award the contract to it) is in direct conflict with the rule of construction announced in Bu-Vi-Bar, *supra.*

The opinion of the Court of Appeals in the case at bar twice contains a statement of fact that is not supported by the record. In the transcript of the record at page 165, the following statement appears:

> "and Zell again asked on November 10th, to retract the notice of repudiation having refused to do so".

Again on page 168 of the transcript of the record a similar statement is made as follows:

> "and because Zell, on November 10th, repeated to the Regional Counsel his refusal to retract."

The record shows, as we pointed out in our motion for rehearing (Record, page 171) that the conversation with Zell took place on November 6th and not November 10th. The evidence in the record is as follows:

> "Mr. Stukes, Mr. Ringel, Mr. Zell and myself were present at which time the bids were opened. * * * He (Stukes) asked him (Zell) at that time didn't he want to withdraw the cancellation and proceed to fulll the contract. * * * Mr. Zell replied in effect that he was not interested in withdrawing his notice of cancellation" (Record, pages 112 and 113).

It is undisputed that the bids were opened November 6th (Record, top of page 112) so the conversation with Zell took place before the letter of November 6th was written. If the decision of the Court of Appeals is based upon the assumption that Zell's refusal to withdraw his company's notice of cancellation took place after the three day period established by plaintiff, and this seems to be the case, then the decision is not supported by the record.

The decision of the District Judge which in effect was that the *locus poenetentiae* was extended to November 17th when the plaintiff first changed its position was right under Bu-Vi-Bar, under the text writers and under the legal encyclopedias. As a matter of fact it does not appear that plaintiff ever insisted to the contrary in the lower court. The District Judge found the question for decision to be "whether Seacoast Gas Company, Inc., withdrew its notice of cancellation of its contract prior to the rendering of the

contract to the Trion Gas Company" (Record, page 37). On the trial, the attorney for the plaintiff did not contend that the retraction was not timely but took the position that no retraction was made. For instance, the attorney for the plaintiff stated on the trial in the District Court "the issue seems to be in this case now whether Seacoast Gas Company withdrew its notice of cancellation" (Record, page 119). This issue of fact was decided against plaintiff and such finding was amply supported by the evidence.

Conclusion.

We respectfully submit that the question involved is important in that the Court of Appeals has applied a rule of construction of a contract that is in conflict with the "settled law"; that the time and circumstances within which a party to a contract may withdraw a previous anticipatory renunciation is important and to have the rule with respect thereto incorrectly stated and applied in the Fifth Circuit will cause confusion and miscarriage of justice and for these reasons the writ of certiorari should be granted and the decision of the Court of Appeals reviewed by this Court.

Respectfully submitted,

CHARLES L. GOWEN,
Attorney for the Petitioner.

Address:
First National Bank Building,
Brunswick, Georgia.

Appendix.

In reply refer to
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HOUSING AND HOME FINANCE AGENCY
PUBLIC HOUSING ADMINISTRATION
Atlanta 3, Georgia

November 6, 1947

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Seacoast Gas Company, Inc.
Brunswick, Georgia

Attention: Mr. Carley Zell, *President*

Gentlemen:

As you already are advised, since Mr. Carley Zell was present at the opening of bids, the Government has advertised for bids for supplying all liquified petroleum gas requirements for War Housing Project, Va-44067 at Newport News, Virginia for the period from November 15, 1947 to June 15, 1948. This was made necessary by your notice that you were cancelling your contract for supplying liquified petroleum gas to this project as of November 15, 1947 and would not perform after that date.

Two bids were received pursuant to the advertising hereinbefore mentioned. They are as follows:

Modern Fuel and Service Corporation Charlotte, North Carolina	16.31¢ per therm
Trion Gas Service, Incorporated Brunswick, Georgia	15.75¢ per therm

This is to notify you that unless we receive from you a written withdrawal of your cancellation notice and assurance of continued performance under your contract to furnish the liquified petroleum gas requirement for War Housing Project Va-44067, Newport News, Virginia, within

three days from the date of this notice, we shall proceed to accept the bid of the Trion Gas Service, Incorporated, the low bidder, and hold you and your performance bond obligated for your breach of performance of your contract.

Sincerely yours,

/s/ L. Lindsay
Lowry Lindsay,
Regional Counsel,
For the Director, Region IV.

November 13, 1947

Mr. Lowery Lindsay
Federal Public Housing Authority
Georgia Savings Bank Building
Atlanta 3, Georgia.

Dear Lowery:

Confirming my 'phone conversation with you as of this date, I am writing you so that you may have a written record of our conversation.

It is the plan of Mr. Charles L. Gowen, who represents me,—Mr. Herbert Ringel, former counsel for the Seacoast Gas Company, and the writer to leave here tonight, on the Champion, arriving in Washington Friday morning, November 14th. Therefore, in accord with your suggestion, we shall advise your officials, as we have you, that we propose to continue to perform at Newport News to the best of our ability,—that we admit we had no right to cancel and are rescinding the notice given by Mr. Ringel,—further, that neither you nor Mr. Graham need feel concerned regarding the continuance of service at this project.

However, in fairness to all, we admit that all we are sure of for November is 9 cars, and for December 9 cars.

Yours truly,

Seacoast Gas Company, Inc.

/s/ Carley Zell
President.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 284

SEACOAST GAS COMPANY, INC., AND SAINT PAUL-MERCURY INDEMNITY COMPANY, AS SURETY, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia (R. 37-43) is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 162-167) is reported at 204 F. 2d 709.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1953 (R. 168). The order of the Court of Appeals overruling petitioners' motion for a rehearing was entered on July 20, 1953 (R. 173). The petition for writ of certiorari was filed on August 22, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who wrongfully repudiated its contract to supply gas to a public housing project and was advised that its failure to withdraw the repudiation within three days would be treated as a breach of the contract, may avoid liability for the anticipatory breach by showing that it retracted the repudiation after the three-day period had expired and after the Government had concluded negotiations with another contractor for the completion of the contract.

STATEMENT

This action was brought by the United States to recover damages from the defendants, Seacoast Gas Company, Inc., as principal, and Saint Paul-Mercury Indemnity Company, as surety on Seacoast's performance bond, on account of an alleged breach of a contract to supply gas to a federal housing project (R. 2-6). The District Court rendered judgment in favor of the defendants (R. 42-43), but the Court of Appeals reversed, and directed the entry of a judgment in favor of the United States for the loss occasioned by Seacoast's breach of the

contract (R. 168). The facts—undisputed except in one or two minor particulars which are noted below—may be summarized as follows:

On March 10, 1947, the Government, through the Federal Public Housing Authority (now the Public Housing Administration), entered into a contract with the Seacoast Gas Company, Inc., under which Seacoast, from April 15, 1947, to June 15, 1948, was to supply the liquefied petroleum gas required for heating and cooking at the Government's War Housing Project in Newport News, Virginia, where some 25,000 people were housed (R. 3, 7-17, 28, 31, 70). The contract was executed on behalf of Seacoast by Mr. Carley Zell, who was president of the corporation and, as he later testified, its "owner" by virtue of his ownership of substantially all its stock (R. 17, 56, 68, 88, 97). The appellee, St. Paul-Mercury Indemnity Company, was surety on Seacoast's performance bond in the amount of $25,000 (R. 3, 18-23, 28, 31).

On October 24, 1947, while performance of the contract was in progress, Seacoast, in a letter signed by its attorney, Herbert A. Ringel, wrote to the Government that it intended to cease performance as of November 15, 1947 (R. 72, 144).[1] Replying

[1] This letter, identified as Exhibit D-2, is a part of the record (R. 62, 147-148), though it has not been printed. The text of the letter reads as follows:

"On behalf of Seacoast Gas Company, Inc., we wish to notify you that under the provisions of the above captioned contract, it is our client's intention to cancel same as of November 15, 1947.

You are further advised that Seacoast Gas Company, Inc., has taken this action because of the Government's breach of

to Seacoast's letter of October 24, the Government wrote that it recognized no right in Seacoast to cease performance of the contract and that it proposed to advertise for bids to insure a continued supply of gas at the housing project in the event Seacoast should persist in its repudiation (R. 73, 74, 111). The Government then proceeded, in accordance with this statement of its intentions, to advertise for bids, which were received and opened on November 6, 1947, thirteen days after Seacoast's letter of repudiation and nine days before the date on which Seacoast had announced that it would cease to perform its contract (R. 74, 112, 119).

Informed that the Government was receiving bids to complete the contract Seacoast had repudiated, Carley Zell, president and owner of Seacoast, formed a new corporation, Trion Gas Service, Inc., which submitted a bid in accordance with the Government's invitation (R. 74-75). Zell considered it advisable to form this new corporation since the Government had notified the bonding company of Seacoast's default (R. 75-76). Though the new corporation, Trion, was, like Seacoast, substantially owned by Zell (R. 88, 97), his attorney Ringel, who represented both corporations, advised an official of the Public Housing Administration at the open-

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the terms and conditions of the contract and particularly section 8 thereof, among others."

Though this letter referred to the "Government's breach of the * * * contract," Seacoast later acknowledged (R. 78-79, 133) that there was no such justification for its letter, and it has been conceded throughout this case that Seacoast had no right to repudiate the contract.

ing of the bids "that as far as he knew Mr. Zell had no connection with Trion" (R. 113-114).

Zell was present at the opening of the new bids on November 6, 1947 (R. 112, 119).[2] On this occasion, Zell was asked to withdraw Seacoast's notice that it would cease performing the contract, but he refused to do so (R. 113, 120). The attorney for the Public Housing Administration who made this request and received Zell's refusal later testified that Seacoast's renewed willingness to perform was, of course, precisely what the Government most wanted (R. 121).

The lowest bid received on November 6 for completion of Seacoast's contract was that of Zell's new corporation, Trion. Trion's bid offered to supply the gas required for the housing project at a price of 15.75 cents per therm, 3.81 cents more than the 11.94 cents per therm called for by the contract Seacoast had repudiated (R. 112, 8, 34-35).[3] On the day this bid was received, November 6, the Public Housing Administration's regional counsel wrote to Seacoast by registered mail, attention Carley Zell, advising of the steps the Government had taken and stating that, unless Seacoast retracted its repudiation within three days from the date of that letter, Trion's bid would be accepted and Sea-

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[2] The cited passages in the record contain the positive testimony of two Public Housing Administration officials that Zell was present when the bids were opened, and the trial court so found (R. 41). Zell himself testified that he might have been present, but didn't think so (R. 96).

[3] A "therm" is a unit of heat measurement equal to 100,000 British thermal units (R. 9).

coast and its surety would be held liable for breach of contract.[4]

Zell later testified that this letter, mailed on November 6, arrived at his local post office on the following day, November 7. He was quite certain the post office must have sent him a notice of its arrival and that the letter would have been in his hands on November 7 had he been available to receive it. He testified, however, that he was out of town when the letter arrived and that he did not actually receive it until November 12, six days after it had been mailed. (R. 88).

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[4] This letter, like the one referred to in footnote 1, p. 3, *supra*, is a part of the record identified below as Exhibit D-3 (See R. 62-63, 73), though it has not been printed. It reads as follows:

"As you already are advised, since Mr. Carley Zell was present at the opening of bids, the Government has advertised for bids for supplying all liquefied petroleum gas requirements for War Housing Project, VA-44067 at Newport News, Virginia for the period from November 15, 1947 to June 15, 1948. This was made necessary by your notice that you were cancelling your contract for supplying liquefied petroleum gas to this project as of November 15, 1947 and would not perform after that date.

Two bids were received pursuant to the advertising hereinbefore mentioned. They are as follows:

Modern Fuel and Service Corporation 16.31¢ per therm Charlotte, North Carolina

Trion Gas Service, Incorporated 15.75¢ per therm Brunswick, Georgia

This is to notify you that unless we receive from you a written withdrawal of your cancellation notice and assurance of continued performance under your contract to furnish the liquefied petroleum gas requirements for War Housing Project VA-44067, Newport News, Virginia, within three days from the date of this notice, we shall proceed to accept the bid of the Trion Gas Service, Incorporated, the low bidder, and hold you and your performance bond obligated for your breach of performance of your contract."

Having received no response from Seacoast within the three days specified in its registered letter of November 6, the Government proceeded to the execution of a contract with Zell's other corporation, Trion. The contract with Trion was dated November 10 and was ready for execution on that date except that Trion had not yet secured the required performance bond. On November 10, one Nichols, representing Trion, came to the offices of the Public Housing Administration to execute the contract and was told that he would have to obtain the bond (R. 114). On that day Ringel—the attorney who had previously represented Seacoast and was shortly afterward to represent Seacoast in further dealings with the Government, and who was at that time representing Trion—gave assurances, which were repeated on the days immediately following, that the bond would be ready the next day so that execution of the contract might be completed (R. 114). However, Ringel did not produce the bond until November 17, and the contract with Trion was executed on that day, a Monday (R. 40, 114).

Meanwhile, on November 10—the day the agents of his corporation, Trion, were seeking to execute the new contract—Zell was again asked, in Atlanta, by the Public Housing Administration to retract the notice of repudiation by Seacoast (R. 114-115). He refused this request (*ibid.*), and, according to the testimony of his attorney at the trial of this case, remained adamant in this position at least until November 12 or 13 (R. 137).

On November 13, Zell testified, he was persuaded that he had erred. He called the regional counsel of the Public Housing Administration to tell him so and to say that Seacoast proposed to withdraw its notice of "cancellation" of October 24, given three weeks earlier. The regional counsel replied that the matter would have to be handled in Washington. (R. 77).[5]

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[5] Thereupon, on the same day, Zell testified, he wrote the following letter to the regional counsel (R. 77-79):

"Confirming my 'phone conversation with you as of this date, I am writing you so that you may have a written record of our conversation.

It is the plan of Mr. Charles L. Gowen, who represents me—Mr. Herbert Ringel, former counsel for the Seacoast Gas Company, and the writer to leave here tonight, on the Champion, arriving in Washington Friday morning, November 14th. Therefore, in accord with your suggestion, we shall advise your officials, as we have you, that we propose to continue to perform at Newport News to the best of our ability, that we admit we had no right to cancel and are rescinding the notice given by Mr. Ringel; further, that neither you nor Mr. Graham need feel concerned regarding the continuance of service at this project.

However, in fairness to all, we admit that all we are sure of for November is 9 cars, and for December 9 cars."

Zell's secretary testified that she had prepared this letter, that it was her job to take the mail to the post office, and that she had no "recollection of not having mailed this letter" (R. 108-109). The Public Housing Administration's regional counsel testified that he could not remember receiving any such letter (R. 129); another interested official testified that, though he desired Seacoast to announce its willingness to perform the contract, no such announcement was forthcoming until after the contract with Trion had been signed on November 17 (R. 121). A third official testified without contradiction that when Ringel, attorney for Zell and Seacoast, arrived on November 17 to execute the contract at a higher price on behalf of Zell's other corporation, Trion, he made no mention of Zell's having retracted the repudiation of the Seacoast contract (R. 115). The District Court found, however, that the letter of November 13, quoted above, was written by Zell, mailed, and received by

On Friday, November 14, Zell, with his attorneys, Messrs. Ringel and Gowen, conferred in Washington with officials of the Public Housing Administration. As the District Court pointed out (R. 40), there was a sharp dispute as to what transpired at this conference, but the Court found (1) that Zell was referred back to the regional office and (2) that Zell's attorney called the regional counsel long distance and again advised him that Seacoast's notice of "cancellation" was withdrawn.

It is undisputed, in any event, that Ringel arrived at the offices of the Public Housing Administration on Monday, November 17, with the required bond; that the contract with Zell's new corporation, Trion, was accordingly executed on that day; and that the gas for the housing project was thereafter supplied and billed at the higher price through Trion rather than through Seacoast.[6] And on March 27, 1951, the present suit was instituted by the Government seeking recovery from Seacoast and its surety of the difference between the price at which Seacoast had agreed to furnish the gas and the price the

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the Public Housing Administration (R. 42). On this finding, the letter presumably was received in the government office on Friday, November 14, the work day preceding the one on which the contract with Trion was signed.

[6] The gas continued to be supplied formally through Seacoast until November 25, when Seacoast was directed to cease its operations (R. 40-41). The Public Housing Administration's regional utility officer testified he assumed Trion had already commenced performance under its contract, and that the instruction to Seacoast was issued when attorney Ringel, acting now for Trion, announced that Trion had not yet "entered in up there because you folks [P.H.A.] haven't told us to" (R. 117).

Government had been required to pay for completion of the contract (R. 2-26).

At the trial, Zell testified that the only difference between the two contracts was that the new one was performed in the name of his corporation Trion rather than his corporation Seacoast, supplying the same gas Seacoast would have supplied but at a higher price (R. 85, 97, 100, 101). Zell also testified that, beginning with his letter of repudiation of October 24, 1947, his primary objective was to free himself altogether from the obligation to supply gas for the housing project (R. 95-96). He testified that he had not wanted the contract for his corporation Trion either, that he "would have been the proudest person in the world" if someone else had gotten it, and that he had submitted the new bid only in order to protect himself if Seacoast was later held liable for the difference between the original contract price and the new price (R. 103-104).

The District Court held that Seacoast was not liable for the difference in price, so that Zell, in his capacity as Trion Corporation, was entitled to keep this additional payment for the contract which had not been completed by Seacoast. The court, finding that Seacoast had withdrawn its notice of concellation before the new contract with Trion was signed, concluded that Seacoast had committed no breach.

The Court of Appeals reversed stating (R. 167), "The error of the district judge lies, we think, in holding that the *locus poenitentiae* was extended until the 17th, when the contract was signed, and that Seacoast having repented before the signing

of the contract, had healed the breach and restored the contract to its original vitality." 204 F. 2d at 712. The court further stated (R. 166), "In fact and in law, when the government took bids and notified Seacoast that unless it retracted within three days it would proceed to accept the Trion bid and award the contract to it, the *locus poenitentiae* ended with these three days."[7] 204 F. 2d at 711.

ARGUMENT

As the court below pointed out (R. 167), this case presents a claim growing out of a business practice that can scarcely be applauded. One Zell owned and controlled Seacoast Gas Company, Inc., a petitioner herein. Zell caused Seacoast to make a contract with the Government to supply gas for a housing project, which he later considered to be disadvantageous (R.123). He thereupon caused the contract to be renounced and promptly organized a new corporation (Trion Gas Service, Inc., whose ownership was unknown to the Government) which he utilized in making a new contract to supply the gas at a higher price per unit. Having

[7] The court also said (R. 166-167):

"The fact that Seacoast claims that it did not receive the notice is completely immaterial both because it was not necessary for the government to give any notice or fix any time and because Zell, on November 10th, repeated to the Regional Counsel his refusal to retract.

"All that is required to close the door to repentence is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied either by the filing of a suit or a firm declaration, as here, that unless within a fixed time the breach is repudiated, it will be accepted.

"Here, in addition to this firm declaration, the record shows the taking of bids and the awarding of the contract to the lowest bidder." 204 F. 2d at 711-712.

obtained and performed the new contract at the higher price, Mr. Zell pocketed the difference of more than $34,000. The contention is now made (Pet. 4-5, 11) that Seacoast, the corporation that repudiated its contract, should not be held liable for the damages resulting from the breach, because it withdrew its repudiation before the formal contract with Trion, the new corporation, was actually signed. The contention is wholly without merit, and, in any event, Seacoast's position is so inequitable as to afford no reasonable grounds for a review of the case by this Court.

1. The decision of the court below presents no departure from recognized legal principles, and it is plain that it correctly applies those principles to the facts of the instant case. Seacoast's letter of October 24, 1947, advising that it would cease performance on November 15 was an admittedly unjustified total breach of its contract and the Government had a right to sue at once on account of that breach.[8] It was likewise privileged, as it did, to fix a time for repentance (which Seacoast clearly could not have claimed as a matter of right), after which the breach would be considered to be final. *Bu-Vi-Bar Petroleum Corp.* v. *Krow,* 40 F. 2d 488, 492 (C. A. 10).

Seacoast's unwarranted breach of contract, timed to coincide with the approach of winter, confronted the agents of the Government with the necessity of

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[8] *Roehm* v. *Horst,* 178 U.S. 1, 8-9; *Bu-Vi-Bar Petroleum Corp.* v. *Krow,* 40 F. 2d 488, 490 (C.A. 10); *Parker* v. *King,* 68 Ga. App. 672, 674-675, 23 S.E. 2d 575, 577; *Simpson* v. *Scott,* 189 Va. 392, 397, 53 S.E. 2d 21, 23-24; 17 C. J.S. 973.

securing immediately a reliable fuel supplier for the 25,000 inhabitants of the housing project at Newport News, Virginia. Prompt action was vital and prompt action was taken. The Government advertised for and received bids on a new contract and then advised Seacoast by registered letter that it could repair its breach within three days of November 6 or a contract would be made with a third party and Seacoast would be required to pay the difference between the original contract price and the higher price required by the new contract.[9]

The Government's action in seeking to contract for a new supply of fuel for the housing project was concrete evidence of its reliance upon the anticipatory breach of Seacoast and Seacoast well knew of the action taken through its president and owner, Zell, who was also, through his new corporation, Trion, the party in interest under the new contract.[10] The action of the Government constituted a material change of position sufficient in itself to show an election to treat the breach as final even under the authorities cited by petitioners[11] (Pet.

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[9] The Government was fully entitled to determine for itself the period it would allow for retraction. The paramount importance of providing an uninterrupted supply of fuel to the housing project fully justified imposing a three-day *locus poenitentiae*.

[10] It appears that Zell himself talked with an agent of the Government on November 10 (R. 115) and that his own agent, Nichols, representing Trion, also appeared on that date and stated that he wished to proceed to execute the new contract and go forward (R. 114). The Government was then unaware of Zell's ownership and control of Trion.

[11] Even on the relatively liberal view taken by the *Restatement of Contracts* (Section 319), the Government's position is clearly correct. The *Restatement* would allow the repudiator to retract unless the injured party has (1) brought suit or (2)

5-10). Consequently, petitioners' complaint (Pet., p. 5), that the rule of interpretation laid down by the court below is a departure from the "rules long established by text writers" and the usual rules of construction applied by the majority of the courts, is without substance. Petitioners' whole argument is, in reality, predicated on the assumption that the period of repentance was extended until November 17, when Trion finally produced a performance bond and signed the new contract with the Government.[12] The court below correctly disposed of this assumption in its holding that "when the government took bids and notified Seacoast that unless it retracted within three days it would proceed to accept the Trion bid and award the contract to it, the *locus poenitentiae* ended with these three days." (R. 166.) 204 F. 2d at 711.

"otherwise materially changed his position in reliance" on the repudiation. It is plain that the actions of the Government following Seacoast's repudiation amply satisfy the requirement that there be a change of position where no suit has been instituted. The steps taken by the Government were no less costly and no less time consuming than the filing of a complaint for breach of contract. The Government not only declared unequivocally its intention to treat the breach as final after November 9, but it spent time and money advertising for bids on a new contract. It received and considered bids, negotiated with the low bidder, drafted a new contract dated November 10 and was prepared to sign the contract on that date.

[12] The new contract would have been signed on November 10 except for the delay of Trion, Zell's new corporate creature, whose ownership was then unknown to the Government, in producing a performance bond. This delay is unexplained in the record. However, if petitioner's view were adopted, it would be entirely possible for Zell, the owner and moving spirit behind both corporations, to have Trion delay securing a performance bond until Seacoast had an opportunity to make a face saving offer of continued performance and thus avoid liability for its wrongful breach.

Having wrongfully repudiated its contract in wanton disregard of its obligation and of the welfare of the 25,000 occupants of the housing project which it supplied with fuel, Seacoast is not in a position to assert that it cured the breach by its tardy and questionable offer to retract. Seacoast remained adamant in its refusal to withdraw its notice of discontinuance until three days after a bid had been accepted for a new contract, which was just two days before the day set for its severance of service to the housing project. It could not then by a qualified and unsatisfactory offer to withdraw from its untenable position avoid its legal obligation to pay the difference between its original contract price and the higher price required by the new contract. "After a party to a contract has repudiated it, or breached it, and the other party has relied thereon, he cannot reinstate the contract by an offer to perform."[13]

2. There is no merit in petitioners' assertion that the decision of the court below is in conflict with the case of *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F. 2d 488 (C.A. 10). In fact the two decisions are plainly in harmony. Both the *Bu-Vi-Bar* case and the decision of the court below recognize that a promisee may continue to look to the promisor for performance notwithstanding the promisor's anticipatory breach. But both cases just as clearly hold

[13] *Finch* v. *Sprague*, 117 Wash. 650, 656, 202 Pac. 257, 259. See also *Mutual Loan Soc., Inc.* v. *Stowe*, 15 Ala. App. 293, 296, 73 So. 202, 204; *Liberty Life Ins. Co.* v. *Olive*, 180 Ark. 339, 342, 21 S. W. 2d 405, 406; *Louisville Packing Co.* v. *Crain*, 141 Ky. 379, 391, 132 S.W. 575, 579.

that the promisee may set and enforce a *locus poenitentiae,* a definite time for repentance, after which the breach will be considered as final. In both cases the promisees changed their positions in reliance upon the breach of the promisor and notice of an election to treat the breach as final was held not to be necessary.[14] It is true that in *Bu-Vi-Bar* there was no attempt to withdraw the promisor's repudiation, but the distinction is not material, for in the instant case, Seacoast's attempted withdrawal clearly come too late. The same conclusion of law was reached in both cases.

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[14] In *Bu-Vi-Bar Petroleum Corp.* v. *Krow,* 40 F. 2d 488, 492 (C.A. 10), the silence of the promisor after the promisee had fixed a *locus poenitentiae* was held to constitute a continuation of the promisor's repudiation. In the instant case we have the even stronger circumstance of Zell's repeated and positive refusals to retract. Petitioners contend (Petition, pp. 11-12) that the court below was in error when it stated that Zell was again asked on November 10 to retract and that he refused to do so. The natural inference of the testimony of the witness W. F. Graham (R. 114-115) is that this is exactly what happened and there is nothing in the findings of the district court to dispute this interpretation (R. 38-42). Even if Zell had not repeated his refusal to retract on November 10, this should make no difference in the decision of this case because such a finding was at most an alternative basis for the decision of the court below and, in any event, silence should be held to constitute a continuation of the promisor's repudiation as in *Bu-Vi-Bar.*

CONCLUSION

The decision below is correct and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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